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MICHAEL RODAK, JR., CLERK

No. 78-1607

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*In the Supreme Court of the United States*

OCTOBER TERM, 1978

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MARYLAND LUMBER COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FOURTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES  
IN OPPOSITION**

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WADE H. MCCREE, JR.  
*Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*

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Petitioner seeks review of an order enforcing an Internal Revenue summons directing a bank to produce its business records relating to petitioner's accounts with the bank. Petitioner contends that the district court erred in denying it an evidentiary hearing or discovery to explore the question whether the Internal Revenue Service had made an institutional decision to refer the case to the Department of Justice for prosecution prior to the issuance of the summons.

The records sought by the summons contain information similar to that sought by an earlier summons issued to petitioner. Although the same district court ordered the previous summons enforced, petitioner failed to comply with the summons. (*United States v. Maryland Lumber Co.*, No. N-76-1664 (D. Md. Jan. 25, 1977), appeal

dismissed, No. 77-1338 (4th Cir. Oct. 5, 1978)). Upon representations from counsel that the information sought was the same information which it had previously ordered petitioner to produce, and that petitioner's defense to the summons was the same as in the previous case, the district court ordered this summons in this case enforced. The court of appeals affirmed. In its view, the government established a prima facie case for enforcement of the summons and petitioner had not presented any new facts in support of its defense or any affidavits countering the government's showing. It therefore held that the district court did not abuse its discretion in summarily disposing of the case and denying petitioner discovery and an evidentiary hearing (Pet. App. 4a-5a).

The decisions of this Court uniformly hold that the government need make only a prima facie showing that it is entitled to enforcement of an Internal Revenue summons and that such a showing shifts to the party opposing enforcement the burden of proving that enforcement would constitute an abuse of the court's process. See, e.g., *United States v. Powell*, 379 U.S. 48 (1964); *Donaldson v. United States*, 400 U.S. 517 (1971); *United States v. LaSalle National Bank*, 437 U.S. 298 (1978). Here, petitioner's only defense to the summons was one that was previously rejected by the district court: that the summons was issued solely for criminal investigative purposes because the agent had formed a firm purpose to recommend prosecution. But as this Court pointed out in *United States v. LaSalle National Bank*, *supra*, 437 U.S. at 314-317, the critical inquiry is whether the Internal Revenue Service has abandoned its institutional responsibility to collect taxes and civil fraud penalties. That a single agent intends only to gather evidence for a criminal investigation is not dispositive of the institutional good faith of the Internal Revenue

Service. There was, accordingly, no need for a hearing or discovery because neither procedure could have benefited petitioner.

Here, as the court of appeals recognized (Pet. App. 4a), petitioner alleged no new facts and did not present any affidavits countering the agent's affidavit in support of the petition for enforcement. In the absence of even the allegation of a colorable defense to the summons, the district court's enforcement of the summons in the absence of either a hearing or discovery was entirely appropriate. *United States v. Morgan Guaranty Trust Co.*, 572 F. 2d 36 (2d Cir. 1978), cert. denied, No. 77-1586 (Oct. 2, 1978); *United States v. Church of Scientology of California*, 520 F. 2d 818 (9th Cir. 1975); *United States v. Newman*, 441 F. 2d 165 (5th Cir. 1971).

Petitioner further argues (Pet. 7-9) that the government had the burden of showing that the summons was not issued after an institutional decision by the Internal Revenue Service to refer the case to the Department of Justice for prosecution. But this Court has held that the party challenging the summons has the burden of proving that the summons was issued for an improper purpose (*United States v. Powell*, *supra*), including the burden of disproving the actual existence of a valid civil tax determination or collection purpose by the Service (*United States v. LaSalle National Bank*, *supra*, 437 U.S. at 316). Petitioner failed to allege any facts that would, if proved, have met that burden.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.  
*Solicitor General*

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